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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THOMAS M.,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether juveniles, subject to probationary search terms, lose all reasonable expectations of privacy under the Fourth Amendment based on their status as minors, such that a searching police officer need not have any prior knowledge of the search terms before conducting a search or seizure of their person.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES. iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

How the Federal Question was Presented . . . 3

The Facts Upon Which the Federal Question Arose 4

The Opinion Below 4

REASONS WHY THE WRIT SHOULD ISSUE . . . 6

Introduction 6

I. THE LOWER COURTS' OPINIONS CONFLICT DIRECTLY WITH THE PRINCIPLES ESTABLISHED BY SUPREME COURT PRECEDENT REGARDING THE FOURTH AMENDMENT PROTECTIONS APPLICABLE TO JUVENILES, PROBATIONERS AND PAROLEES. 6

Page

A. The Lower Courts Evaluated Improperly the Application of The Fourth Amendment to Juvenile Probationers 7

B. The Lower Court's Distinction between Minors and Adults Stands in Direct Opposition to this Court's Precedent 9

II. THIS COURT SHOULD GRANT THE PETITION TO REMEDY THE LOWER COURTS' ERADICATION OF JUVENILE'S FOURTH AMENDMENT RIGHTS 17

CONCLUSION 20

APPENDIX A
OPINION, CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, DATED APRIL 20, 1993 . . . . . A1

APPENDIX B
PETITION FOR REVIEW GRANTED BY THE CALIFORNIA SUPREME COURT, FILED JULY 22, 1993 . . . . . B1

APPENDIX C
PETITION FOR REVIEW DISMISSED BY THE CALIFORNIA SUPREME COURT, FILED NOVEMBER 23, 1994 . . . C1

APPENDIX D
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED D1

TABLE OF AUTHORITIES

Page

Cases

Breed v. Jones,
421 U.S. 519 (1975) 10

California v. Ciraolo,
476 U.S. 207 (1986) 7

California v. Hodari D.,
499 U.S. 621 (1991) 10

Camara v. Municipal Court,
387 U.S. 523 (1967) 7, 9

Ciulla v. State,
434 S.W.2d 948 (Tex.Civ.App. 1968) 11

Delaware v. Prouse,
440 U.S. 648 (1979) 19

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 15

Gallegos v. Colorado,
370 U.S. 49 (1962). 10

Griffin v. Wisconsin,
483 U.S. 868 (1987) 6, 12-16

Hudson v. Palmer,
468 U.S. 517 (1984) 7

In re Gault,
387 U.S. 1 (1967) 10, 19

Page

In re Harvey,
222 Pa.Super 222, 295 A.2d 93 (1972) 11

In re Marsh,
40 Ill.2d 53, 237 N.E.2d 529 (1968) 11

In re Martinez,
1 Cal.3d 641, 463 P.2d 734,
83 Cal.Rptr. 382 (1970) 14, 16

In re Morris,
29 Ohio Misc. 71, 278 N.E.2d 701 (1971) 11

In re Scott K.,
24 Cal.3d 395, 595 P.2d 105,
155 Cal.Rptr. 671 (1979). 11, 18

In re Tyrell J.,
8 Cal.4th 68, 876 P.2d 519,
32 Cal.Rptr.2d 33 (1994). . . . . *passim*

In re William G.,
40 Cal.3d 550, 709 P.2d 1287,
221 Cal.Rptr. 118 (1985). 11

In re Williams,
49 Misc. 2d 154, 267 N.Y.S.2d 91
(Fam. Ct., Ulster Co. 1966) 11

In re Winship,
397 U.S. 358 (1970) 10

Katz v. United States,
389 U.S. 347 (1967) 7-9

Page

Lanes v. State,
767 S.W.2d 789 (Tex.Cr. App. 1989) 18, 19

Moss v. Weaver,
525 F.2d 1258 (5th Cir.1976) 11

New Jersey v. T.L.O.,
465 U.S 325 (1985) 6, 7, 10-13

O'Connor v. Ortega,
480 U.S. 709 (1987) 13

Oliver v. United States,
466 U.S. 170 (1984) 7

Owens v. Kelley,
681 F.2d 1362 (11th Cir. 1982) 15

Pena v. State,
792 P.2d 1352 (Wyo. 1990) 15

People v. Bravo,
43 Cal.3d 600, 738 P.2d 336,
238 Cal.Rptr. 282 (1987). 16

People v. Burgener,
41 Cal.3d 505, 714 P.2d 1251,
224 Cal.Rptr. 112 (1986). 16

People v. Gallegos,
62 Cal.2d 176, 397 P.2d 174,
41 Cal.Rptr. 590 (1964) 14

People v. Gastelum,
237 Cal.App.2d 205,
46 Cal.Rptr. 743 (1965) 14

Page

Planned Parenthood of Missouri v. Danforth,
428 U.S. 52 (1976). 9, 10

R.W.T. v. Dalton,
712 F.2d 1225 (8th Cir. 1983),
cert. denied, 464 U.S. 1009 (1983). 11

Ricardi v. Perini,
417 F.2d 645 (6th Cir. 1969). 13

Skinner v. Railway Labor Exec. Assn.,
489 U.S. 602 (1989) 7, 9

State v. Lockwood,
632 A.2d 655 (Vt. 1993) 15

State v. Lowry,
95 N.J. Super. 307 (1967) 11

State v. Moses,
159 Vt. 294, 618 A.2d 478 (1992) 15

Terry v. Ohio,
392 U.S. 1 (1968) 8

Tinker v. Des Moines School District,
393 U.S. 503 (1969) 10

Toomey v. Bunnell,
898 F.2d 741 (9th Cir. 1990),
cert. denied, 498 U.S. 960 (1990) 15

United States v. Calandra,
414 U.S. 338 (1974) 17

Page

United States v. Cardona,
903 F.2d 60 (1st Cir. 1990),
cert. denied, 498 U.S. 1049 (1991). 15

United States v. Davis,
932 F.2d 752 (9th Cir. 1991). 15

United States v. Gianetta,
909 F.2d 571 (1st Cir. 1990) 14

United States v. Hill,
447 F.2d 817 (7th Cir. 1971). 13, 18

United States v. Hill,
967 F.2d 902 (3d Cir. 1992) 14

United States v. Johnson,
722 F.2d 525 (9th Cir. 1983). 13

United States v. Leon,
468 U.S. 897 (1984) 17

United States v. Rea,
678 F.2d 382 (2nd Cir. 1982) 19

Constitution

United States Constitution
Fourth Amendment . . . . . *passim*
Fourteenth Amendment 2

Page

Rules

California Rules of Court
Rule 29.4 (c) 2

Federal Statutes

28 U.S.C. § 1257(a) 2

State Statutes

California Health and Safety Code § 11350 . . . . . 2, 3

California Penal Code § 1203.1(j) 2, 15

California Welfare and Institutions Code
§ 602 . . . . . 2, 3
§ 700.1 . . . . . 2, 11
§ 701 3
§ 701.01 3
§ 730(b) 3, 15

Treatise

4 La Fave, *Search and Seizure, A Treatise on the Fourth Amendment* (2d Ed. 1987) sect 10.10(e), sect 1.7(b) 13, 18, 19

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THOMAS M.,
Petitioner,
vs.
STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas M., respectfully petitions for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division Three, in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, appears herein as Appendix A. The order granting review by the Supreme Court appears herein as Appendix B. The later order dismissing review appears herein as Appendix C.[1]

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[1] The opinion was originally ordered published and reported at 14 Cal.App.4th 1801. However, upon the California Supreme Court's granting of review and subsequent dismissal, the opinion has been de-published. When the California Supreme Court dismisses review as improvidently granted, it remands the case back to the Court of

(continued)

JURISDICTION

The judgment of the Court of Appeal, Fourth Appellate District, Division One was entered on April 20, 1993. On July 22, 1993, the Supreme Court of California granted a petition for review. That court suspended the submission of additional briefs pending further order. On November 23, 1994, after having decided this same issue in *In re Tyrell J.*, 8 Cal.4th 68, 876 P.2d 519, 32 Cal.Rptr.2d 33 (1994),[2] the California Supreme Court dismissed the case and remanded it back to the Court of Appeal. The jurisdiction of this Court to review the judgment of the California Court of Appeal is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant text of the constitutional provisions and statutes below is set forth in Appendix D.

United States Constitution, Fourth Amendment

United States Constitution, Fourteenth Amendment

California Health and Safety Code § 11350

California Penal Code § 1203.1(j)

California Welfare and Institutions Code § 602

California Welfare and Institutions Code § 700.1

(fn. continued)
Appeal. The order of dismissal and remand is final and the case is in the same posture as if review by the California Supreme Court had been denied. *See* California Rules of Court, Rule 29.4 (c).

[2] A petition for certiorari was filed in *Tyrell J.* on January 17, 1995, docket no. 94-7668.

California Welfare and Institutions Code § 701
California Welfare and Institutions Code § 730(b)

STATEMENT OF THE CASE

How the Federal Question was Presented

In 1989, Thomas M., a minor, had been placed on juvenile probation, pursuant to California Welfare and Institutions Code § 602, for being in possession of cocaine for sale. On November 14, 1990, the juvenile court ordered that as part of Thomas's probation conditions that he be required to "submit your person and property to search and seizure at any time by any Law Enforcement Officer or Probation Officer." Thomas acknowledged in writing that he understood the court's order.

Thomas was subsequently arrested and charged with, among other things, being in violation of California Health and Safety Code § 11350, possession of cocaine. At a juvenile court hearing, Thomas sought to suppress, pursuant to California Welfare and Institutions Code § 701.1, the cocaine on the grounds that the stop and search which resulted in the discovery of the cocaine violated his rights under the Fourth Amendment of the United States Constitution.

The juvenile court judge granted the motion to suppress the cocaine and the State of California appealed to the Court of Appeal. The Court of Appeal reversed the trial court's ruling with one justice dissenting. The California Supreme Court initially granted review; however, following its decision in *In re Tyrell J.* (1994) 8 Cal.4th 68, which dealt with the same issue presented here, it dismissed this case.

The Facts Upon Which the Federal Question Arose

On March 30, 1991, San Diego police officers observed Thomas and a companion approaching a liquor store which was a known hangout for gang members. The officers were seeking information about a recent gang-related homicide in the area and told Thomas and his companion that they wished to speak with them. Neither Thomas nor his companion were suspects in the homicide, although the officers suspected that both were gang members. Thomas and his companion walked over to the police officer's car where they were ordered to place their hands on top of the car so that they could be patted down for weapons.

As one of the officers began to pat down Thomas, he observed Thomas's left hand go to Thomas's left side and a small paper bindle drop to the ground. The officer picked up the bindle and discovered two rocks of cocaine in it. Thomas was placed under arrest for possession of cocaine. At the hearing on the motion to suppress, the police conceded that at the time they detained and searched Thomas and discovered the bindle of rock cocaine, they did not know he was on probation and was subject to an order requiring that he submit to searches and seizures. As a result, the juvenile court suppressed the evidence of rock cocaine.

The Opinion Below

The State of California appealed this ruling and a majority of the Court of Appeal reversed, finding that Thomas had no legitimate expectation of privacy to contest the search and seizure because he was on juvenile probation. The majority held the fact that the officer had no idea that Thomas was on probation subject to

search terms made no difference because the minor knew he was subject to such search terms and therefore could not have had any legitimate expectation of privacy.

The majority accepted the fact that under California law, the status of juvenile probationers, unlike adult probationers, is analogous to adult parolees in that imposition of juvenile probation is not consensual (App. A10-11 herein). The majority reasoned that the societal interests in reunification and rehabilitation of the minor outweigh any legitimate expectations of privacy that a minor on probation may have. By requiring prior knowledge of the search terms by the police, the majority reasoned, these goals of juvenile probation would be greatly impeded (App. A12-15 herein).

The dissent argued that there was no legitimate governmental purpose to be served by allowing such searches by police ignorant of any search conditions. The fact that the minor knew he was subject to search terms did not matter if the search itself was unconstitutional (App. A18-19 herein). Finally, the dissent argued that the benevolent interests sought to be served by the juvenile justice system would in fact be undermined by encouraging unreasonable police conduct. The dissent warned that taken to its logical conclusion such a policy would mean that Fourth Amendment protection would be inapplicable to anyone under the age of eighteen (App. A20 herein).

REASONS WHY THE WRIT SHOULD ISSUE

Introduction

The lower courts' decisions remove the protections of the Fourth Amendment from juveniles based on their minority status and subvert the policy which underlies the exclusionary rule. The Fourth Amendment of the United States Constitution extends to juveniles and probationers and parolees. *See New Jersey v. T.L.O.*, 465 U.S 325 (1985); *Griffin v. Wisconsin*, 483 U.S. 868 (1987). In direct opposition to this Court's holding that probationers and parolees retain legitimate, yet diminished, expectations of privacy under the Fourth Amendment, the lower courts have held that juvenile probationers lose all legitimate expectations of privacy based on their status as minors. These holdings remove the guarantees of the Fourth Amendment to an entire class of individuals; this Court should not allow such a misapplication of Fourth Amendment law to stand.

I.

THE LOWER COURTS' OPINIONS CONFLICT DIRECTLY WITH THE PRINCIPLES ESTABLISHED BY SUPREME COURT PRECEDENT REGARDING THE FOURTH AMENDMENT PROTECTIONS APPLICABLE TO JUVENILES, PROBATIONERS AND PAROLEES.

The application of the Fourth Amendment and the exclusionary rule which protects against a state's violation of an individual's rights thereunder depends upon a two-step analysis. First, the reviewing court must

determine whether the Fourth Amendment's protections apply to the individual seized and/or searched. *Katz v. United States*, 389 U.S. 347 (1967). If such protections apply, the court must determine whether the governmental interest outweighs the privacy right invaded by the state. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

A. The Lower Courts Evaluated Improperly the Application of The Fourth Amendment to Juvenile Probationers.

Thomas possesses a reasonable expectation of privacy in his person. Under the *Katz* test, which employs a two-pronged analysis, the reviewing court evaluates (1) whether the individual maintained a subjective expectation of privacy in his person, and (2) whether "society is prepared to recognize as 'reasonable,' " that expectation of privacy. *Katz v. United States*, 389 U.S. at 361 (Harlan, J., concurring); *California v. Ciraolo*, 476 U.S. 207, 211 (1986). This Court cannot doubt that Thomas subjectively believed that the contents of his clothing would not be searched by the police at random. In evaluating the objective reasonableness of Thomas's belief, this Court must look to the *place* that the police searched.[3] The fact that this Court in *Katz* recognized the objective reasonableness of an individual's privacy interest in a telephone booth establishes, *a fortiori*, that an individual maintains a reasonable expectation of privacy in his

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[3] *See California v. Ciraolo*, 476 U.S. 207, (1986) (fenced in back yard viewed from public airspace); *Oliver v. United States*, 466 U.S. 170, 178-179 (1984) (open fields); *Hudson v. Palmer*, 468 U.S. 517 (1984) (prison cell); *New Jersey v. T.L.O.*, 465 U.S 325 (1985) (school house); *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602 (1989) (bodily fluids).

person. *See Katz, supra; see also Terry v. Ohio*, 392 U.S. 1, 9 (1968) (holding that a person's body constitutes an area in which an individual possesses an objectively reasonable expectation of privacy). The text of the Fourth Amendment itself lists an individual's person as an "area" protected by the Constitution. U.S. Const. amend. IV ("[t]he right of the people to be secure in their persons . . . shall not be violated").

Here, the lower courts have created a new test, contrary to this Court's precedent, in evaluating Thomas's expectation of privacy. The California Supreme Court in *Tyrell J.*, 8 Cal.4th 68, 876 P.2d 519, 32 Cal.Rptr.2d 33 (1994), conceded that a minor, such as Thomas, exhibited a subjective interest in maintaining his privacy rights, thus meeting the first prong of the *Katz* test. However, that court evaluated the second prong of the *Katz* test, the objective reasonableness of the minor's expectation, based on the minor's knowledge of the search terms to which he was subject, rather than based on society's expectation of privacy as to the place searched. This new test requires the courts to review the objective reasonableness prong of the *Katz* test by reviewing the individual's state of mind. *Tyrell J.* at 86. Not so.

The expectation of privacy that society recognizes as reasonable is not dependent on whether the individual searched knows or should know of the possibility that he or she might be searched. The second prong of the *Katz* test does not examine the individual's state of mind but the area to be searched. What the *Tyrell J.* court has done is shift the standard for application of the Fourth Amendment from a legitimate expectation of privacy in the area searched to a reasonable expectation that a search will occur. Thus, the *Tyrell J.* court has changed the second prong of the *Katz* test to examine the status of

the person to be searched rather than the place to be searched. The danger of this new test is obvious. Basing Fourth Amendment applicability on the status of the individual rather than on the place to be searched means certain groups may not be protected by the Fourth Amendment even though they have met both prongs of the *Katz* test.[4]

B. The Lower Court's Distinction between Minors and Adults Stands in Direct Opposition to this Court's Precedent.

Of course, even if the Fourth Amendment protections apply, the inquiry does not stop there. A determination must be made whether the search is still reasonable. "To hold that the Fourth Amendment is applicable . . . is only to begin the inquiry into the standards governing such intrusions." *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 618-619 (1989). Whether a search by the government is reasonable requires "balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967). The lower courts failed to properly utilize this balancing test as it applies to juvenile probationers.

In general, juveniles possess the same constitutional protections as adults. *See Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976); *Tinker v. Des*

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[4] This is not to say that the status of the individual, such as a probationer, cannot be taken into consideration in applying the balancing test once it is determined that the Fourth Amendment does apply. *See infra.* The lower court, however, incorrectly used status to hold that the Fourth Amendment does not apply in the first place, a holding contrary to the principles set forth in *Katz* and its progeny.

Moines School District, 393 U.S. 503 (1969). The text of the Fourth Amendment makes no distinction between adults and minors; it discusses the right of "the people." U.S. Const. amend IV. This Court's discussion of the Constitution's applications to minors demonstrates this truism. In *Planned Parenthood*, 428 U.S. at 74, this Court stated that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. *Minors, as well as adults, are protected by the Constitution and possess constitutional rights.*" (emphasis added); *see also Tinker*, 393 U.S. 503 (1969).

This Court has consistently held that the constitutional protections afforded adults charged with crimes are generally afforded to juveniles. These include the right to notice, counsel and cross-examination of witnesses, and the protection against self-incrimination, *In re Gault*, 387 U.S. 1 (1967); protection against coerced confessions, *Gallegos v. Colorado*, 370 U.S. 49 (1962); Fifth Amendment protection against double jeopardy, *Breed v. Jones*, 421 U.S. 519 (1975); and proof of guilt beyond a reasonable doubt in delinquency adjudications, *In re Winship*, 397 U.S. 358 (1970). This court thus has generally made "applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions." *Breed v. Jones* at 528-529.

This Court has also found the exclusionary rule to apply in juvenile delinquency proceedings. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *California v. Hodari D.*, 499 U.S. 621 (1991). Every federal and state court that have specifically considered the question of the applicability of the Fourth Amendment to the

juvenile process have found it to be applicable.[5] No court has ever held the Fourth Amendment inapplicable to juvenile proceedings. Indeed, the lower court in *Tyrell J.* observed that "[t]he exclusionary rule applies to juvenile proceedings that — as here — are filed pursuant to Welfare and Institutions Code section 602." *Tyrell J.* at pp. 76-77. *See also* California Welfare Institutions Code § 700.1.

However, the lower courts in this case did not apply properly this Court's analysis of the Fourth Amendment protection provided to juveniles probationers. This Court has held that although a juvenile retains his Fourth Amendment rights while at school, those rights must be balanced against, and may be limited by, the "*special needs*, beyond the normal need for law enforcement, [which] make[s] warrant and probable-cause requirement impracticable" as applied to students. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (Blackmun, J., concurring) (emphasis added).

This Court in *New Jersey v. T.L.O.* held that such a balancing test must "ensure that the [privacy] interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools." *Id.* at 343. Furthermore, in "[d]etermining the reasonableness of any search involves a twofold inquiry:

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[5] *See, e.g., Moss v. Weaver*, 525 F.2d 1258 (5th Cir.1976); *R.W.T. v. Dalton*, 712 F.2d 1225 (8th Cir. 1983) *cert. denied*, 464 U.S. 1009 (1983); *In re Scott K.*, 24 Cal.3d 395; 595 P.2d 105; 155 Cal.Rptr. 671 (1979); *In re William G.*, 40 Cal.3d 550, 709 P.2d 1287, 221 Cal.Rptr. 118 (1985); *In re Marsh*, 40 Ill.2d 53, 237 N.E.2d 529 (1968); *State v. Lowry*, 95 N.J. Super. 307, 230 A.2d 907 (1967); *In re Williams*, 49 Misc. 2d 154, 267 N.Y.S.2d 91 (Fam. Ct., Ulster Co. 1966); *In re Morris*, 29 Ohio Misc. 71, 278 N.E.2d 701 (1971); *In re Harvey*, 222 Pa.Super 222, 295 A.2d 93 (1972); *Ciulla v. State*, 434 S.W.2d 948 (Tex.Civ.App. 1968).

first, one must consider 'whether the . . . action was justified at its inception,' [citation omitted]; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' [citation omitted]." *Id.* at 341. In that case this Court found that balancing the "special needs" of the school house environment with the privacy rights of the students required that any search must be based on a reasonable suspicion, although that suspicion need not rise to the level of probable cause. *Id.*

The lower courts in this case have not adopted the "special needs" balancing test that this Court required in *New Jersey v. T.L.O.* While the "special needs" of the juvenile probationer may well require a standard of proof less than probable cause in order to conduct a search or seizure, there must still be a finding of "reasonableness." The test of reasonableness set forth in *New Jersey v. T.L.O.* — that a search be "justified at its inception" and not be excessive in its scope — cannot be met where a police officer has neither knowledge of the juvenile's status as a probationer nor any suspicion of criminal wrongdoing.

Because the lower courts misapplied the "special needs" analysis as set forth in *New Jersey v. T.L.O.*, they also failed to properly apply this Court's ruling in *Griffin v. Wisconsin*, 483 U.S. 868 (1987). In that case, this Court applied the "special needs" exception to the warrant requirement to validate a warrantless search authorized by a probation officer based on a reasonable suspicion of criminal conduct. *Griffin*, 483 U.S. at 873. In applying the special needs doctrine to probationers, this Court relied on the facts that (1) the search was based on reasonable suspicion, (2) the search was authorized by a probation officer whose goals were

different from typical police investigation of crime,[6] and (3) the probation officer *knew* of the individual's status as a probationer. *Id.* at 873-880.

None of the three necessary conditions to this Court's holding in *Griffin* exist in the instant case. Thomas was searched by a police officer who (1) had no reasonable suspicion to justify a search, (2) was investigating a crime and not a probation violation, and (3) did not know of Thomas's probationary status. "Whatever might be concluded about the necessity to permit the police to play some role in the enhanced scrutiny to be directed at those on probation and parole, quite obviously there is no rational basis upon which to uphold otherwise illegal police searches of persons only later determined to be on probation or parole." 4 La Fave, *Search and Seizure, A Treatise on the Fourth Amendment* (2d Ed. 1987) sect 10.10(e), pp. 154-155. Under these circumstances, the finding of reasonableness in *Griffin* is absent in the case at bar.[7]

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[6] *See also O'Connor v. Ortega*, 480 U.S. 709, 724 (1987) (public employers who conduct investigations are not, like police officers, enforcers of the criminal law); *New Jersey v. T.L.O.*, 469 U.S. 325, 349-50 (1985) (teachers who conduct searches are not, like police officers, involved in an adversarial relationship with students).

[7] Even prior to this Court's ruling in *Griffin*, federal courts held that prior knowledge of a parolee or probationer's status was required by a searching police officer in order to justify the search. In *Ricardi v. Perini*, 417 F.2d 645, 648 (6th Cir. 1969), the court held unlawful a parole search on facts very similar to this case. "In the case before us the officers did not know the appellee, had no prior information about him, did not know that he was on parole and had no knowledge that a crime had been committed." *See also United States v. Hill*, 447 F.2d 817, 820 (7th Cir. 1971) (Fairchild, J., dissenting); *United States v. Johnson*, 722 F.2d 525, 528 (9th Cir. 1983).

Ironically, the California Courts have also held that knowledge of a parolee's status as such was required by the searching police

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The court in *Tyrell J.*, held that *Griffin* did not apply because it "involved (1) a condition imposed by state regulation, (2) the necessity of approval by the probation officer's supervisor, and (3) a requirement of reasonable cause to search," none of which applied in California. *Tyrell J.* at 78. The *Tyrell J.* court found that the search condition there, like the one in *Thomas M.*, was imposed by a court, was conducted by a police officer, and under state law did not require reasonable cause. *Id.* However, it is these very reasons that make the type of search conducted here unreasonable under *Griffin*.

The fact that the probationary search is done pursuant to a court order, as opposed to a regulatory scheme, makes no difference. Knowledge of the probation terms, as well as reasonable suspicion are required in either case in order to make such a search reasonable. In *United States v. Gianetta*, 909 F.2d 571, 575 (1st Cir. 1990) the court held, contrary to the *Tyrell J.* court, that probationary searches conducted pursuant to a court order, as opposed to a "legislative or administrative framework" must "have the same characteristics as the search upheld in *Griffin*." In *United States v. Hill*, 967 F.2d 902 (3d Cir. 1992), the court held that a parole search made in the absence of a statute or regulatory

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(fn. continued)
officer in order to justify the search. The California Supreme Court in *In re Martinez*, 1 Cal.3d 641, 463 P.2d 734, 83 Cal.Rptr. 382 (1970) held such a search unlawful noting that "officers cannot undertake a search without probable cause and then later seek to justify their actions by relying on the defendant's parole status, a status of which they were unaware at the time of the search." *See also People v. Gallegos*, 62 Cal.2d 176, 397 P.2d 174, 41 Cal.Rptr. 590 (1964); *People v. Gastelum*, 237 Cal.App.2d 205, 46 Cal.Rptr. 743 (1965). However, that same court ignored this requirement when evaluating the nonconsensual, warrantless, and suspicionless search of Thomas based on his status as a juvenile.

scheme is valid only when it is conducted to determine the parolee's success on parole and based upon specific facts. *Id.* at 909-911. *See also Toomey v. Bunnell*, 898 F.2d 741 (9th Cir. 1990), *cert. denied*, 498 U.S. 960 (1990); *State v. Moses*, 159 Vt. 294, 618 A.2d 478 (1992); *State v. Lockwood*, 632 A.2d 655 (Vt. 1993); *Pena v. State*, 792 P.2d 1352 (Wyo. 1990).[8] Obviously, the goals of probation or parole can only be achieved when the officer has prior knowledge of the search conditions.

Finally, the lower courts' reasoning in *In re Tyrell J.*, that the rehabilitative and reunification principles of juvenile law outweigh the Fourth Amendment rights of juveniles is no different than the rehabilitative purposes of probation that this Court found in *Griffin*.[9] Yet, this Court did not hold that such rehabilitative goals under-

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[8] While some of these cases involved a parole search as opposed to a probation search, for constitutional purposes, the distinction is meaningless. There is no difference between the constitutional status of probationers and parolees for Fourth Amendment purposes. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982); *United States v. Cardona*, 903 F.2d 60 (1st Cir. 1990), *cert. denied*, 498 U.S. 1049 (1991); *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991). The *Cardona* court noted that "[i]n fact, parole may be an even more severe restriction on liberty because the parolee has already been adjudged in need of incarceration. [citation omitted]" *Cardona, supra*, at 909. As Justice Kennard notes in her dissent, the majority in *Tyrell J.* holds just the opposite. *Tyrell J., supra*, at 95, n.1 (Kennard, J., dissenting).

[9] This Court should note that the purposes behind imposing juvenile probationary terms under California law is the same as it is with adult probation: to see that "the interests of justice" are done and to provide for the "reformation and rehabilitation" of the probationer. *Compare* California Welfare and Institutions Code § 730(b) *with* California Penal Code § 1203.1(j).

mined the reasonable grounds standard. To the contrary, this Court used that fact in the balancing equation to determine that while probable cause need not be required to justify a warrantless search, reasonable suspicion was required; more simply, *Griffin* did not in any way authorize nonconsensual, suspicionless searches of probationers.[10] The government must justify its search of Thomas with some reasonable quantum of suspicion. None exists in the instant action. Thomas was not even involved in any suspected criminal activity. He was simply detained, searched, and interrogated in the hope that the police might uncover some information about a homicide in which he was not even a suspect.

These principles, as set forth in *Griffin*, demonstrate clearly that when the search is conducted by a police officer without any knowledge of the probationary status, and without reasonable suspicion of unlawful conduct, such searches do not further the ends of the probation system. If a police officer is ignorant as to the search conditions, he cannot be in the same position as a probation or parole officer. Therefore, the "special needs" justification that was found in *Griffin* is absent here. *See Tyrell J., supra*, at 92 (Kennard, J., dissenting).

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[10] It is important for this Court to note that the California Supreme Court held that under California law, juvenile probationers, like adult parolees, but unlike adult probationers, do not consent to search terms. *Tyrell J.* at 83. *See also People v. Burgener*, 41 Cal.3d 505, 533, 714 P.2d 1251, 224 Cal.Rptr. 112 (1986); *People v. Bravo*, 43 Cal.3d 600, 738 P.2d 336, 238 Cal.Rptr. 282 (1987). When evaluating searches of adult parolees, that court required a showing that the searching officer *know* of the parolee's status of the individual in order to justify the search. *In re Martinez*, 1 Cal.3d 641, 646, 463 P.2d 734, 83 Cal.Rptr. 382 (1970).

II.

THIS COURT SHOULD GRANT THE PETITION TO REMEDY THE LOWER COURTS' ERADICATION OF JUVENILE'S FOURTH AMENDMENT RIGHTS

If these rulings are allowed to stand, the police in this country will be free to "search first and ask questions later" of any juvenile for little if any reason whatsoever. *In re Tyrell J., supra*, at 99 (Kennard, J., dissenting). Not only does this ruling substantially impair the rights of juveniles in this country, it undermines the purpose behind the exclusionary rule. In *United States v. Calandra*, 414 U.S. 338, 347 (1974) this Court observed that "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . ." *See also United States v. Leon*, 468 U.S. 897, 906 (1984).

The holdings of the lower courts will not deter future unlawful police misconduct; in fact, such decisions invite and encourage warrantless and suspicionless searches. The warrantless, suspicionless searches authorized by the lower courts allow the police to stop and search any juvenile they see fit to for no reason whatsoever. This blanket authorization directly contravenes the stated purpose of the exclusionary rule — to deter police misconduct. Deterrence of warrantless, suspicionless searches is undermined when courts permit the police to detain and search any juvenile for practically any reason in the hope that it will turn out they are on probation. "[I]t is not to be expected that the police

will feel compelled to follow the constraints of the Fourth Amendment in investigating juveniles if they know that there is available an alternative to criminal prosecution which involves no exclusion for police misconduct but which permits the imposition of substantial sanctions upon those so processed." 1 La Fave, *Search and Seizure, A Treatise on the Fourth Amendment* (2d Ed. 1987) sect 1.7(b), p. 150. As one judge stated, "it is more consistent with any fundamental principle of the exclusionary rule that it be applied on the basis of what the officers knew and thought they were doing than on the basis of a fact which would have relaxed the standard, but which was unknown to them." *United States v. Hill*, 447 F.2d 817, 820 (7th Cir. 1971) (Fairchild, J., dissenting).

Nor would the goals of the juvenile justice system, reformation and reunification, be severely eroded by requiring police knowledge of a juvenile probationer's search terms prior to detaining and searching him.[11] "A child arrested without valid reason by a seemingly all-powerful and challengless exercise of police power would instantly intuit the injustice and react accordingly. Even a juvenile who has violated the law but is unfairly arrested will feel deceived and thus resist any rehabilitative efforts. [citation omitted]." *Lanes v. State*, 767 S.W.2d 789, 795. If anything, promoting a "search first and ask questions later" approach by the police may well undermine a juvenile's respect for the very society he is

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[11] In fact, the California Supreme Court has recognized that "[s]earch and seizure laws, however, hardly seem disruptive or otherwise inconsistent with the state's interest in child welfare. It is established that minors have a liberty interest that entitles them to due process whenever a state initiates action to deprive them of liberty. [citations omitted]" *In re Scott K.*, 24 Cal.3d 395, 402, 595 P.2d 105, 155 Cal.Rptr. 671 (1979).

expected to integrate into. "It is now poignantly evident that good intentions alone cannot replace constitutional safeguards." *Lanes, supra*, at 800. *See also United States v. Rea*, 678 F.2d 382, 387 (2nd Cir. 1982) where the court held that "indiscriminate searches are likely to undermine, rather than advance, the rehabilitative goals of the probation system. [citation omitted]" Since *In re Gault*, 387 U.S. 1 (1967) this Court's holdings espouse the concept that "a juvenile justice system which accepts evidence without regard to the manner in which it was obtained will, perhaps to an even greater degree, fail to fulfill the objectives of the process." 1 La Fave, *Search and Seizure, A Treatise on the Fourth Amendment* (2d Ed. 1987) sect 1.7(b), p. 150.

The grave danger of abuse of discretion in this kind of case has been stated previously by this Court. "This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Delaware v. Prouse*, 440 U.S. 648, 661-662 (1979).

Requiring the police to have knowledge of a juvenile probationer's status before a search on less than probable cause would not impede the rehabilitative and reunification goals of juvenile probation. As the dissent in the instant case stated "[e]ven this broad and arguably benevolent governmental interest cannot be furthered by encouraging unreasonable police conduct, unless one takes the extreme position that errant juveniles must be apprehended no matter what the cost." (App. A-20 herein) In essence this is what the lower courts have held. To allow this policy to continue in the United States would, as the dissent points out, "[c]arried to its logical conclusion . . . suggest that Fourth Amendment protections are simply inapplicable to anyone under the

age of eighteen . . . ." *Id.* As Justice Kennard pointed out in her dissent in *Tyrell J.* "[a] policy more at odds with the purpose underlying the Fourth Amendment would be difficult to imagine." *Id.* at 99. The holdings of the lower courts are directly contrary to the precedents set forth by this Court. The lower courts have set not only a different but a dangerous precedent which this Court must reverse.

CONCLUSION

Based on the arguments reasoned above, this Court should grant petitioner's writ of certiorari.

Dated: February 17, 1995.

Respectfully submitted,

RICHARD P. SIREF
Deputy Public Defender
Counsel of Record

FRANCIS J. BARDSLEY
Public Defender

Attorneys for Petitioner
THOMAS M.

APPENDIX A

CERTIFIED FOR PUBLICATION

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

FILED
Stephen M. Kelly, Clerk
APR 20 1993
Court of Appeal Fourth District

In re THOMAS M., a Person Coming Under the Juvenile Court Law.

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THE PEOPLE,
Petitioner, Plaintiff and Appellant,
v.
THOMAS M., a Minor,
Defendant, Respondent and Cross-Appellant.

D014749, D014838
(Super. Ct. No. J157160)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Reversed in part; affirmed in part.

Edwin L. Miller, Jr., District Attorney, Thomas F. McArdle and James E. Atkins, Deputy District Attorneys, for Petitioner, Plaintiff and Appellant.

Francis J. Bardsley, Public Defender, Richard P. Siref and Anthony Hernandez, Deputy Public Defenders for Defendant, Respondent and Cross-Appellant.

In this case a prior juvenile court order required that a juvenile submit to searches and seizures by law enforcement officers. After this order was imposed the juvenile was stopped and subjected to a weapons "pat down." During the course of the patdown the juvenile allegedly dropped a bindle of rock cocaine on the ground.

The juvenile moved to suppress the rock cocaine on the grounds the stop and search violated his rights under Fourth Amendment of United States Constitution. The juvenile court granted the motion and the People filed a timely notice of appeal. We reverse. Given the terms of the juvenile court's prior order, the juvenile had no reasonable expectation he could avoid a stop and pat down performed by law enforcement officers.

FACTUAL AND PROCEDURAL BACKGROUND

On November 14, 1990, the juvenile court issued a number of orders to Thomas M., a minor. Among other mandates, Thomas was required to "submit your person and property to search and seizure at any time by any Law Enforcement Officer or Probation Officer." The search and seizure order grew out of Thomas's violation of probation previously imposed as a result of a 1989 finding Thomas had been in possession of cocaine for sale. On the face of the order Thomas acknowledged in writing that he read and understood the court's order.

Four months later on March 30, 1991, San Diego police officers observed Thomas and a companion, James Evans, approaching the entrance to Dr. J's Liquor Store, a known hangout for members of the Syndo/ Lincoln Park gang. The officers were looking for

information about a recent gang-related homicide in the area and one of the officers told Thomas and Evans he wanted to talk to them. Thomas and Evans walked over to the officers' car and were instructed to put their hands on top of the car so that they could be patted down for weapons.

According to one of the officer's testimony, as he was patting Thomas down, he noticed Thomas's left hand go to Thomas's left side and a small paper bindle drop to the ground. The officer picked up the bindle and found two rocks of cocaine in it. The officer then placed Thomas under arrest. Initially Thomas identified himself to the police as Ronald Johnson.

On April 2, 1991, the People filed a petition, alleging Thomas violated Health and Safety Code section 11350 (possession of cocaine) and therefore came within the jurisdiction of the juvenile court under the provisions of Welfare and Institutions Code section 602. The petition further alleged Thomas violated the juvenile court's prior order by being in possession of a controlled substance, by wearing a green baseball cap which identified him as a member of the Syndo gang and by being within four blocks of 5000 Logan Avenue in San Diego. On April 15, 1991, an amended petition was filed which repeated the allegations of the original petition and added an allegation Thomas falsely identified himself to the police in violation of Penal Code section 148.9.

Thomas moved to suppress the rock cocaine and the false identity he gave the police. At the hearing on Thomas's motion, the police conceded that at the time they stopped Thomas and discovered the bindle of rock cocaine, they did not know he was subject to an order requiring that he submit to searches and seizures performed by law enforcement officers.

On April 30, 1991, the juvenile court granted Thomas's motion with respect to the rock cocaine. The court found the search conditions imposed on Thomas did not alter his protection under the Fourth Amendment because the officers who stopped him were unaware of the conditions. Later the court denied Thomas's motion to suppress his false identity.

Thereafter the parties stipulated the evidence received at the hearing on the motion to suppress would be considered by the juvenile court in lieu of trial. In light of its order suppressing the rock cocaine, the trial court dismissed the two counts which alleged possession of a controlled substance. The juvenile court then sustained the remaining allegations of the petition.

At a disposition hearing Thomas was continued as a ward of the court and placed in a 24-hour school in Pennsylvania as an alternative to CYA placement. The court also set review hearings.

The People filed a timely notice of appeal from the trial court's order dismissing the allegations based on Thomas's possession of the rock cocaine.[1]

ISSUE ON APPEAL

On appeal the People argue that in light of the juvenile court's November 14, 1990, order requiring Thomas to submit to searches and seizures, Thomas had no standing to contest the lawfulness of his stop, the

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[1] Thomas M. also filed a notice of appeal and we consolidated his appeal and the People's appeal. Thomas's counsel filed a *Wende* brief. (See *People v. Wende* (1979) 25 Cal.3d 436, 443; *People v. Johnson* (1981) 123 Cal.App.3d 106, 109-112.) We have reviewed the record and have found no arguable grounds for appeal on Thomas's behalf. Accordingly with respect to the counts upon which the trial court made true findings, the judgment is affirmed.

patdown search or the officer's recovery of the bindle of rock cocaine. In particular, the People argue the prior order governed Thomas's reasonable expectations at the time of the stop even though the police were unaware of the order. We agree and reverse.

I

A. Recent Opinions

The issue raised by the People has been the subject of recent Court of Appeal opinions. In *In re Marcellus* (1991) 229 Cal.App.3d 134, 145-146 (*Marcellus*), and *In re Binh L.* (1992) 5 Cal.App.4th 194, 205-206 (*Binh*), courts held conditions imposed in orders granting probation to juveniles will defeat later Fourth Amendment claims even when officers conducting challenged searches and seizures are unaware of the previously imposed conditions. (See also *In re Jamont C.* (1993) __ Cal.App.4th __ [Mar. 11, 1993, 93 Daily Journal D.A.R. 3277]; *People v. Viers* (1991) 1 Cal.App.4th 990, 993.)

On appeal Thomas contends these opinions are inconsistent with the holdings in *In re Martinez* (1970) 1 Cal.3d 641, 646 (*Martinez*), and *People v. Burgener* (1986) 41 Cal.3d 505, 535 (*Burgener*). In *Martinez* the court held the People may not rely on search conditions imposed as a condition of *parole* unless the police officers are aware of the condition at the time they conduct a search. (*In re Martinez, supra*, 1 Cal.3d at p. 646.) In *Burgener* the court held parole searches must also be supported by a "reasonable suspicion" the parolee is involved in criminal activity or has otherwise violated his parole and that a search will disclose evidence of the crime or parole violation. (*People v. Burgener, supra*, 41 Cal.3d at p. 535.) Like the courts in *Marcellus* and *Binh*, we believe the Fourth Amendment

rights of juvenile probationers are not governed by principles applicable to adult parolees.

B. Parole Searches and Probations Searches

The Supreme Court has repeatedly drawn sharp distinctions between offenders subject to parole and those subject to probation. (*People v. Burgener, supra*, 41 Cal.3d at pp. 531-532; *People v. Bravo* (1987) 43 Cal.3d 600, 607-609 (*Bravo*).) " 'The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in a society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.' (*Morrissey v. Brewer* [(1972)] 408 U.S. [471,] 483.) That the parole may come at the end of a term of imprisonment, rather than as part of that term, does not lessen the societal interest identified by the court." (*People v. Burgener, supra*, 41 Cal.3d at pp. 531-532.)

On the other hand, "A convicted defendant released on probation, as distinguished from a parolee, has satisfied the sentencing court that notwithstanding his offense imprisonment in the state prison is not necessary to protect the public. The probationer may serve a jail term as a condition of probation ([Pen. Code] § 1203), but his probation is not a period of reintegration into society during which the same degree of surveillance and supervision as that deemed necessary for prison

inmates is required. A parolee cannot claim an equivalent status. The imprisonment preceding his parole has come about just because he poses a significantly greater risk to society. His offense may have been such that he was ineligible for probation initially. (See [Pen. Code] §§ 1203, 1203.06-1203.09.) The sentencing judge may have determined that the defendant posed too great a risk to the public to warrant a grant of probation. [Citation.] Or, the defendant may have been sentenced to prison following a revocation of probation occasioned by his failure to comply with conditions of probation." (*People v. Burgener, supra*, 41 Cal.3d at pp. 532-533.)

In addition to the material differences in status, the court has noted each system of governmental restraint — parole and probation — imposes burdens on individual offenders in a distinct manner. "The Board of Prison Terms has no discretion to grant or withhold parole to a prisoner who has served a determinate term. The prisoner neither applies for nor has the right to reject release on parole. Section 3000, subdivision (a), is a mandatory 'kick-out' providing that '[a]t the expiration of a term of imprisonment . . . imposed pursuant to Section 1170 or at the expiration of such term as reduced pursuant to Section 2931 . . . the inmate shall be released on parole for a period not exceeding three years, unless the board for good cause waives parole and discharges the inmate from custody of the department.' Although the board must revoke parole if the prisoner refuses to sign the parole agreement (§ 3060.5), the parolee's acceptance of parole under the determinate sentence law is in no sense pursuant to a voluntary agreement by which he has waived his right to privacy in exchange for release on parole." (*People v. Burgener, supra*, 41 Cal.3d at p. 529, fn. 12.)

In addition, although the Board of Prison Terms has discretion in imposing some parole conditions, a search condition *must* be imposed on *every* parolee. (Cal. Code Regs., tit. 15, § 2511, subd. (b) 4; Pen. Code, §§ 3052-3053; see also *People v. Burgener, supra*, 41 Cal.3d at pp. 531-532.)

Imposition of probation is markedly different. "The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate." (*People v. Lent* (1975) 15 Cal.3d 481, 486.) "When granting probation, courts have broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety. Penal Code section 1203.1 authorizes the court to impose any 'reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, . . . and specifically for the reformation and rehabilitation of the probationer.' If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence. [Citations.]" (*In re Bushman* (1970) 1 Cal.3d 767, 776.)

Unlike a parole condition, a probation condition is invalid under Penal Code section 1203.1 "if it (1) has no relationship to the crime of which the defendant is convicted, (2) relates to conduct that is not itself criminal, or (3) requires or forbids conduct that is not reasonably related to future criminality. [Citation.]" (*In re Bushman, supra*, 1 Cal.3d at p. 777.)

Significantly, the Supreme Court has found the discrete circumstances which make individuals subject to each system of restraint and the distinctive manner in which each system operates require separate analysis of due process and Fourth Amendment claims. Thus, the Supreme Court has found that given the heightened danger parolees represent to society, the state may

impose search conditions on parolees without regard to the nature of the crime they have committed. (*People v. Burgener, supra*, 41 Cal.3d at p. 533.)

However, parolees are not entirely without legitimate privacy interests. (*People v. Burgener, supra*, 41 Cal.3d at p. 533.) Because the need to supervise parolees is the justification for permitting warrantless searches, those searches must be directly related to proper parole supervision purposes. (*Ibid.*) Moreover, a parole search must be supported by information which raises a reasonable suspicion the parolee is engaged in criminal behavior or otherwise violating the terms of his parole. (*Id.* at pp. 533-534.)

In determining that information which supports a parole search need only raise a reasonable suspicion of illicit activity rather than establish probable cause that such activity is occurring, the court engaged in a process of balancing the interests of the government in performing parole searches against the invasion which such searches entail. (*People v. Burgener, supra*, 41 Cal.3d at p. 534.) " 'On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.' " (*Ibid.*)

In contrast, in considering probation searches the court found that *no* balancing of competing interests was required. (*People v. Bravo, supra*, 43 Cal.3d at pp. 608-609.) "A probationer, unlike a parolee, consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term. Probation is not a right, but a privilege. . . . A probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain. [Citations.] Were we to conclude that a

probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose. We see no basis for denying a defendant the right to waive his Fourth Amendment rights in order to accept the benefits of probation. The reasonable-suspicion standard adopted in *Burgener, supra*, 41 Cal.3d 505, for parole searches, therefore, has no application to searches conducted pursuant to a consensual probation order." (*Ibid.*)

C. Juvenile Probation Searches

Because some authorities have suggested that, unlike the *adult* probation discussed in *Bravo*, imposition of *juvenile* probation is not consensual (see, e.g., *In re Nathaniel Z.* (1986) 187 Cal.App.3d 1132, 1140; *In re Wayne J.* (1979) 97 Cal.App.3d 776, 780; 1 Cal. Juvenile Court Practice (Cont.Ed.Bar 1981) § 9.52, p. 255), Thomas has argued we cannot rely upon *Bravo* in determining what the Fourth Amendment requires of juvenile probation searches. We agree.

Although the cases which have found that juvenile probation is mandatory have done so in discussing unrelated issues, our examination of the underlying statutory provisions convinces us that, unlike adult probation under Penal Code section 1203.1, juvenile

probation is not consensual.[2] The problem we have with this premise is that it has led Thomas to a faulty

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[2] Welfare and Institutions Code section 202, subdivision (a), states the purpose of the juvenile court law "is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. When removal of a minor is determined by the juvenile court to be necessary, reunification of the minor with his or her family shall be a primary objective. When the minor is removed from his or her own family, it is the purpose of this chapter to secure for the minor custody, care, and discipline as nearly as possible equivalent to that which should have been given by his or her parents. This chapter shall be liberally construed to carry out these purposes."

When a child has been found within the jurisidiction of the juvenile court because of a violation of law, the court must either make him a ward of the court or place him on probation for six months without adjudging him a ward. (Welf. & Inst. Code, § 725, subds. (a) and (b).) Welfare and Institutions Code section 727, subdivision (a), states in pertinent part: "When a minor is adjudged a ward of the court on the ground that he or she is a person described by Section 601 or Section 602 the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the minor, including medical treatment, subject to further order of the court. . . .

" . . . . . ."

"In the discretion of the court, a ward may be ordered to be on probation without supervision of the probation officer . . . .

"In all other cases, the court shall order the care, custody, an control of the minor to be under the supervision of the probation officer who may place the minor in any of the following:

"(1) The home of a relative.

"(2) A suitable licensed community care facility.

"(3) With a foster family agency to be placed in a

(continued)

conclusion. While we agree the lack of consent in juvenile probation orders prevents us from adopting the consent rationale set forth in *Bravo*, we cannot share Thomas's conclusion we are left with no alternative other than adopting the limitations mandated by *Martinez* and *Burgener* for parole searches. Having recognized the differences between juvenile probation and adult probation, we are not inclined to ignore what we view as even larger differences between juvenile probation and adult parole.

The differences between juvenile probation and adult parole were fully set forth in *In re Binh L.*: "Unlike a parolee, a minor cannot be made subject to an automatic search condition. The statutory authority for juvenile probation condition is Welfare and Institutions Code section 730, which provides in pertinent part that when a ward is placed under the supervision of the probation officer '[t]he court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' It has been suggested that cases which fix the statutory

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(fn. continued)

> suitable licensed foster family home or certified family home which has been certified by the agency as meeting licensing standards."

In describing this statutory scheme the Supreme Court has stated: "Unlike adult criminal proceedings in which probation may be granted as an act of leniency in appropriate cases, but where denial of probation and imposition of sentence to a term of imprisonment is ordinarily not an abuse of discretion, the Juvenile Court Law ' "contemplates a progressively restrictive and punitive series of disposition orders in cases such as that now before us — namely, home placement under supervision, foster home placement, placement in a local treatment facility and, as a last resort, Youth Authority placement." ' (*In re Aline D.* (1975) 14 Cal.3d 557, 564.)" (*In re Arthur N.* (1976) 16 Cal.3d 226, 237.)

boundaries of *adult* probation provisions are pertinent as well to juvenile probation orders [citations], and thus that '[a] probation condition "will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' " [Citation]' [Citations.] Indeed, the power of the juvenile court is even broader than that of a criminal court: 'Because of its rehabilitative function, the juvenile court has broad discretion when formulating conditions of probation. "A condition of probation which is impermissible for an adult criminal defendant is not necessarily unreasonable for a juvenile receiving guidance and supervision from the juvenile court." [Citation.] "[I]n planning the conditions of appellant's supervision, the juvenile court must consider not only the circumstances of the crime but also the minor's entire social history. [Citations.]" [Citation.]' [Citations.] 'Even conditions which infringe on constitutional rights may not be invalid if tailored specifically to meet the needs of the juvenile [citation].' [Citations.] But every juvenile probation condition must be made to fit the circumstances and the minor." (5 Cal.App.4th at p. 203.)

Admittedly, because juvenile probation is not consensual, in determining what the Constitution requires before juvenile probation searches may be performed, like the court in *Burgener* we are required to balance the competing interests of juvenile probationers and the government. "The balancing of competing interests to determine the scope of Fourth Amendment protections in a particular setting is well settled. Whether a particular search is reasonable depends on a balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of

the governmental interests alleged to justify the intrusion.' " (*In re William G.* (1985) 40 Cal.3d 550, 563-564; see also *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 327.)

Initially, we note that as a juvenile probationer subject to a search condition, Thomas's expectations of privacy were plainly more circumscribed than those of an adult parolee. "Because the search condition was tailored for and expressly made known to and individually imposed upon the minor, the search condition must be deemed to have had an impact on the minor's reasonable expectation of privacy far more direct than that of a parole condition automatically imposed one every parolee. The minor knew, by a direct and valid order of the juvenile court, that he was subject to warrantless search at any time or place by any probation or police officer." (*In re Binh L., supra*, 5 Cal.App.4th at p. 205.)

The question which remains, however, is whether an order creating such diminished expectations is permissible. "[T]he reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' [Citations.]" (*Delaware v. Prouse* (1979) 440 U.S. 648, 654.)

Here, the intrusion posed by a juvenile probation search is limited by significant procedural protection afforded juvenile probationers. Importantly, unlike adult parolees, juvenile probationers have the opportunity to object to the imposition of search conditions when they believe the intrusion they represent is not warranted by

the offenses they have committed. (See *In re Frank V.* (1991) 233 Cal.App.3d 1232, 1242-1243.) In addition, even when the Fourth Amendment does not require individualized suspicion, no search may be carried out for harassment or for arbitrary or capricious reasons. (*People v. Bravo, supra*, 43 Cal.3d at p. 611.)

Moreover the government's interests in knowing about the activities of a particular juvenile probationer are unique and significant. Unlike the adult criminal justice system, one of the fundamental goals of the juvenile court law is strengthening the juvenile's ties with his family when the family has been unable to provide necessary discipline and guidance. (Welf. & Inst. Code, § 202, subd. (a); *In re Wayne J., supra*, 97 Cal.App.3d at pp. 782-783; *People v. Dotson* (1956) 46 Cal.2d 891, 895.) Thus, where a juvenile court has previously found a search condition is warranted, the goal of reunification and rehabilitation (see fn. 2, *ante*) is greatly served both by the deterrence created when a juvenile recognizes he is subject to search by law enforcement officers at anytime and by the government's enhanced ability to detect violations of probation conditions and promptly address continuing problems. (See *People v. Bravo, supra*, 43 Cal.3d at p. 610.)

In sum then, given a juvenile's ability to object to search conditions before they are imposed and the particular societal interests present when juvenile probation is imposed, we do not believe the additional protections required by *Martinez* and *Burgener* are warranted. Rather those additional requirements — prior knowledge of the search condition and reasonable suspicion of proscribed conduct — would materially impede the rehabilitative and reunification goals of juvenile probation without significantly advancing the interests of juvenile probationers. (*In re Jamont C., supra*, __ Cal.App.4th __.)

II

Our analysis does not end with our conclusion Thomas's search condition was not subject to the requirements of *Martinez* and *Burgener*. As we have noted, even when the usual individualized suspicion required by the Constitution has no application, citizens still have the right to be free of harassment and searches conducted for arbitrary and capricious reasons. (*People v. Bravo, supra*, 43 Cal.3d at pp. 610-611; *In re Binh L., supra*, 5 Cal.App.4th at p. 206.)

Here, Thomas argues that even if no prior knowledge of his search condition or reasonable suspicion of proscribed behavior was required before he was searched, the officers nonetheless were guilty of harassment. However, we note there is no dispute Thomas was wearing gang colors in an area where gang activity is prevalent and that the officers testified they were investigating a gang-related homicide. Thus, the record does not support Thomas's contention that he established as a matter of law the level of bad faith needed to support a harassment claim. (See *In re Binh L., supra*, 5 Cal.App.4th at p. 206.)

On the other hand, although the trial court's unwillingness to suppress the false identity Thomas gave the police suggests the court did not believe the officers were acting in bad faith, there is no direct finding in the record on the harassment issue. Thus on remand Thomas will be free to again urge that, even in light of Thomas's probation condition, the police conduct requires suppression of the rock cocaine.

CONCLUSION

Because the trial court's order suppressing the cocaine was based on its conclusion prior knowledge of the search condition was necessary, and because the suppression led to dismissal of the two counts alleging possession of the cocaine, the judgment must be reversed with respect to those two counts.

Judgment reversed in part and affirmed in part.[3]

/s/ BENKE
BENKE, J.

I CONCUR:

/s/ HUFFMAN
HUFFMAN, J.

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[3] See footnote 1, *ante*.

WIENER, J., dissenting.

The majority opinion provides a comprehensive review of the relevant caselaw on this issue and a helpful framework for analysis. It correctly concludes, in my view, that the consent rationale of *People v. Bravo* (1987) 43 Cal.3d 600 is inapplicable in the juvenile probation context and that the propriety of the search here must be evaluated by balancing " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " (*In re William G.* (1985) 40 Cal.3d 550, 564, quoting *United States v. Place* (1983) 462 U.S. 696, 703; see maj. opn., *ante*, pp. 1289, 1291.)

The Supreme Court's decision in *People v. Burgener* (1986) 41 Cal.3d 505 establishes that the privacy interests of adult parolees are outweighed by the governmental interests in discovering parole violations to the extent of permitting searches without a warrant based on reasonable suspicion. (*Id.* at pp. 533-534.) A similar balancing process would yield the conclusion that juvenile probationers may be subject to similar searches. Indeed, it is arguable that the broad rehabilitative purposes of the juvenile court law might justify, at least in some circumstances, probation conditions allowing searches unaccompanied even by reasonable suspicion on the theory that law enforcement officers should be allowed virtually random administrative searches to confirm that the juvenile is complying with probation requirements.

Even assuming a juvenile probationer may be required to submit to warrantless searches unsupported even by reasonable suspicion, I am unable to discern any legitimate governmental purpose to be served by permitting such searches by officers who do not know the juvenile is on probation and subject to a broad search condition.

Based on the information known to the officer, a search is impermissible unless accompanied by probable causes and, in most cases, a warrant.

It could of course be argued that once it is determined an individual may properly be subject to a search without a warrant and probable (or perhaps even reasonable) cause, it makes no difference from the individual's standpoint whether the officer conducting the search knows of the probation search condition. (See, e.g., *In re Marcellus L.* (1991) 229 Cal.App.3d 134, 143.) Yet, such an approach is plainly inconsistent with the Supreme Court's decisions in *Burgener* and *In re Martinez* (1970) 1 Cal.3d 641 which evaluate the search from the government's perspective. (*Martinez, supra*, 1 Cal.3d at pp. 646 and 647, fn. 6; *Burgener, supra*, 41 Cal.3d at p. 534.)

The reasons offered by the majority do not address the governmental interest in permitting what would otherwise be unreasonable searches of persons whom officers do not know to be subject to a probation search condition. The rationale articulated in *In re Binh L.* (1992) 5 Cal.App.4th 194 and adopted by the majority here — that the minor's knowledge of the search condition reduces his reasonable expectation of privacy (see *id.* at p. 205) — begs the question since any unreasonable condition could be justified on the theory that the juvenile was told of the condition in advance. Unconstitutional practices do not become constitutional merely because there has been adequate warning. (See *De Lancie v. Superior Court* (1982) 31 Cal.3d 865, 876.) In any event, the minor's subjective expectations, whatever they may be, do not create or supplement a governmental interest in allowing unreasonable searches. Similarly, the fact that a juvenile may challenge an unreasonable search condition following its imposition (see maj. opn., *ante*, at p. 17) does not address what

governmental purpose is served when law enforcement officers conduct an unreasonable search "and then later seek to justify their actions by relying on the defendant's [juvenile probation] status, a status of which they were unaware at the time of their search." (*In re Martinez, supra*, 1 Cal.3d at p. 646.)

Finally, the majority attempts to justify the search here with the conclusionary statement that a requirement of prior knowledge of the search condition "would materially impede the rehabilitative and reunification goals of juvenile probation without significantly advancing the interests of juvenile probationers." (Maj. opn., *ante*, at p. 18.) I have already suggested some broad purposes might justify a search condition on less than reasonable suspicion. Even this broad and arguably benevolent governmental interest cannot be furthered by encouraging unreasonable police conduct, unless one takes the extreme position that errant juveniles must be apprehended, no matter what the cost. Carried to its logical conclusion, such a theory would suggest that Fourth Amendment protections are simply inapplicable to anyone under the age of eighteen, a proposition clearly inconsistent with established precedent. As the Supreme Court explained in *In re Scott K.* (1979) 24 Cal.3d 395, 402, "Justice should not be compromised by well-intentioned aims to correct transgressing youths, and the rehabilitative value of treating juveniles with fairness must not be underrated."

Consistent with binding Supreme Court precedent in *Martinez* and *Burgener*, I see no basis to conclude there is a legitimate governmental purpose to be served by allowing law enforcement officers without probable cause to conduct unreasonable searches of juveniles who later turn out to be subject to a broad probation search condition which would have permitted the search.

Accordingly, I respectfully dissent.

/s/ WIENER
WIENER, Acting P.J.

APPENDIX B

No. 4/2 D014749/D014838
S033048
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SUPREME COURT
FILED
JUL 22 1993
Robert Wandruff Clerk

Deputy

IN RE THOMAS M.,
A Person Coming Under the Juvenile Court Law

- - - - - - - - - - - - - - - - - -

PEOPLE, Appellant
v.
THOMAS M., Respondent.

Respondent's petition for review GRANTED.

Submission of additional briefing, otherwise required by rule 29.3, California Rules of Court, is deferred pending further order of the court.

/s/ Lucas
Chief Justice

/s/ Mosk
Associate Justice

/s/ Panelli
Associate Justice

/s/ Kennard
Associate Justice

/s/ Arabian
Associate Justice

/s/ Baxter
Associate Justice

/s/ George
Associate Justice

APPENDIX C

No. 4/1 D014749/D014838
S033048
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SUPREME COURT
FILED
NOV 23 1994
Robert Wandruff Clerk

Deputy

IN RE THOMAS M.,
A Person Coming Under the Juvenile Court Law

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PEOPLE, Appellant
v.
THOMAS M., Respondent.

Pursuant to rule 29.4(c), California Rules of Court, the above-entitled review is DISMISSED and cause is remanded to the Court of Appeal, Fourth Appellate District, Division One.

/s/ Lucas
Chief Justice

/s/ Kennard
Associate Justice

/s/ Arabian
Associate Justice

/s/ Baxter
Associate Justice

/s/ George
Associate Justice

/s/ Werdegar
Associate Justice

Associate Justice

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

Federal Constitutional Provisions:

1. The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

State Statutes:

California Health and Safety Code section 11350 states in relevant part:

> . . . every person who possesses . . . any controlled substance [cocaine] . . . shall be punished by imprisonment in the state prison.

California Penal Code section 1203.1(j) states in relevant part:

> The court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that

> amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer, and that should the probationer violate any of the terms or conditions imposed by the court in the matter, it shall have authority to modify and change any and all the terms and conditions and to reimprison the probationer in the county jail with the limitations of the penalty of the public offense involved.

California Welfare and Institutions Code section 602 states in relevant part:

> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crimes other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

California Welfare and Institutions Code section 700.1 states in relevant part:

> Any motion to suppress as evidence any tangible or intangible thing obtained as a result of an unlawful search or seizure shall be heard prior to the attachment of jeopardy and shall be heard at least five judicial days after receipt of notice by the people unless the people are willing to waive a portion of time.
>
> If the court grants a motion to suppress prior to the attachment of jeopardy over the objection of the people, the court shall enter a judgment of dismissal as to all counts of the petition

> except those counts on which the prosecuting attorney elects to proceed pursuant to Section 701.
>
> If, prior to the attachment of jeopardy, opportunity for this motion did not exist or the person alleged to come within the provisions of the juvenile court law was not aware of the grounds for the motion, that person shall have the right to make this motion during the course of the proceeding under Section 701.

California Welfare and Institutions Code section 701 states in relevant part:

> At the hearing, the court shall first consider only the question whether the minor is a person described by Section . . . 602. The admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision. Proof beyond a reasonable doubt supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602 . . . .

California Welfare and Institutions Code section 730(b) 602 states in relevant part:

> When a ward described in [section 602] is placed under the supervision of the probation officer or committed to the care, custody, and control of the probation officer, the court may make any and all reasonable orders for the conduct of the ward . . . . The court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.